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No. 72-1572

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In the Supreme Court of the United States

OCTOBER TERM, 1972

JOYCE I. BINKLEY, *Petitioner,*

v.

MANUFACTURER'S LIFE INSURANCE CO., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Order and Judgment of the United States District Court for the District of Colorado, Civil Action No. C-2759, as yet unreported, appears at Appendix A of Petitioner's Brief, at A-1. The opinion of the United States Court of Appeals, Tenth Circuit, selected for publication although as yet unreported, appears at Appendix E of Petitioner's Brief. Final judgment of the United States Court of Appeals, Tenth Circuit, being a denial of Petition for Rehearing, unreported, appears at Appendix C of Petitioner's Brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, Respondent would point out that the Rules of the Supreme Court state that review of the Writ of Certiorari is "not a matter of right, but of sound judicial discretion, and will be granted only with special and important reasons therefore." Rule 19 (1), U.S. Sup.Ct., 28 U.S.C.A.

QUESTIONS PRESENTED

The questions presented hereby are:

(1) Does the decision of the United States District Court and the affirmance of that decision by the Tenth Circuit Court of Appeals conflict with any existing decisions of the United States Supreme Court?

(2) Does a conflict exist between the Fifth and Tenth Circuit Courts of Appeal on the question presented?;

(3) Is a substantial federal question presented or any reasons which compel a review of the decision below?

CONSTITUTIONAL PROVISIONS INVOLVED

No Constitutional provisions are presented by this Petition.

STATEMENT OF FACTS

Respondent supplements Petitioner's Statement of Facts as follows:

Defendant issued a group policy of insurance to the Bank of Denver dated May 9, 1961, insuring all eligible employees

of the bank. Pursuant to the terms of the policy it issued a "Certificate of Insurance" dated May 9, 1966, in the original amount of $12,000.00 to Arby J. Binkley, husband of Petitioner.

This group policy was term insurance and contained what is commonly referred to as a "conversion privilege." This privilege allowed an employee after termination to convert the insurance so terminated to an individual policy of life insurance without being required to furnish evidence of insurability, subject to the following conditions:

(1) That the policy to be issued will be issued on the form then in use by the insurance company, and would include any clauses then regularly included in any individual life policy then customarily issued by the company (Para. 26(b) of group policy);

(2) The policy will become effective at the end of the thirty-one (31) day period after the termination of employment (Para. 26(e) of group policy);

(3) If the employee dies during the thirty-one (31) day period, he remains covered under the group policy (2nd Para. p. 16 of group policy); and

(4) When the individual policy becomes effective, it will be in exchange for all privileges and benefits with respect to the employee's insurance or the part thereof terminated under the group policy (4th Para. p. 16 of the group policy).

If the conversion privilege was not exercised, the group policy coverage terminated at the end of the thirty-one (31) day period (Para. 25, p. 14 of the group policy).

On March 24, 1969, the insured made application for a $15,000.00 whole life policy. He further requested such new

policy contain a disability premium waiver and accidental death benefits. While it is true that the application contained statements indicating the $15,000.00 whole life policy was to replace the $12,000.00 group life policy the Insured had with the Company, the record is silent as to whether the conversion right *per se* was exercised. In any event, the record is undisputed that the Insured took a medical examination as part of the application for the $15,000.00 whole life policy, and the policy issued contained waiver of premium and double indemnity accidental death benefits. In addition, the new policy contained a one-year suicide clause providing that if the Insured committed suicide within one year from the policy's "date of issue", the Company's liability would be limited to the sum of the premiums paid. The policy provided on page 2 that the date of issue was May 26, 1969.

The Death Certificate of the State of Colorado shows that the Insured died of carbon monoxide poisoning on November 5, 1969, such death being labeled "suicide." It should be noted that, although the policy provides for double indemnity in the case of accidental death, the Petitioner did not seek any additional sum for accidental death benefits, a tacit admission that the death was in fact caused by suicide. That no genuine issue of fact is raised by the circumstances of death, was conceded by both parties.

ARGUMENT

Petitioner has presented the Court with a very narrow question of fact within the context of the case before the Court. That is, whether or not the circumstances involved warrant a finding that one continuous contract was in existence rather than the two distinct contracts as found by the District Court and the Tenth Circuit Court of Appeals. The facts of the case are not in dispute. The District Court's interpretation of Colorado law has not been challenged. No federal or constitutional question has been presented to this Court. Petitioner

has only attempted to show that the District Court failed to follow a decision of this Court and that a conflict exists between the Fifth and Tenth Circuits on a question of insurance contract law. It is Respondent's position that not only were the decisions of this Court followed, but that no conflict arises among the Circuit Courts.

I.

THE DECISION BELOW IS CLEARLY CORRECT AND DOES NOT CONFLICT WITH A DECISION OF THIS COURT

The decision of the District Court was correct in its determination of Colorado law and in no way conflicts with any decisions of this Court. As the Court of Appeals for the Tenth Circuit pointed out when there is "apparently no Colorado law on the particular point involved . . .[i]n such circumstances, we should accept the trial court's determination of state law unless such appears to be clearly erroneous." See *Sta-Rite Industries, Inc. v. Johnson,* 453 F.2d 1192 (10th Cir. 1972), *cert. denied,* 406 U.S. 958 (1972); *Manville v. Borg-Warner Corporation,* 418 F.2d 434 (10th Cir. 1969); and *Cranford v. Farnsworth & Chambers Co.,* 261 F.2d 8 (10th Cir. 1958). The concurring opinion of Lewis, J. also points to the expertise of the 10th Circuit panel as to its familiarity with Colorado law.

Moreover, the District Court's interpretation of the law does not conflict with any announced Supreme Court decisions. That no such conflict exists is obvious upon examination of the case cited by Petitioner, *Aetna Life Insurance Company v. Dunken,* 266 U.S. 389, 45 S.Ct. 129 (1924). Contrary to Petitioner's view, the *Dunken* case, *supra,* did not involve the same question as was before the Colorado District Court. As the Circuit Court pointed out, this Court in *Dunken* recognized that whether a second contract of insurance made in pursuance of the provisions of an earlier one is to be deemed

a separate contract or a single continuing one, is a "matter not always free from difficulty." This Court went on to hold that the second contract and the earlier one were but one continuing contract and, in so holding, observed that the "terms of the new policy were fixed when the original policy was made." In the instant case, as noted, the terms of the individual policy differed from those called for by the terms of the group policy.

In fact, the *Dunken* case, *supra,* cites an earlier case which did face a more compatible question to the instant case. See, *Gans v. Aetna Life Insurance Company,* 214 N.Y. 326, 108 N.E. 443 (N.Y. Ct. App. 1915). In that case, the original policy contained a provision to the effect that if the insured committed suicide within one year from the date thereof, the policy should be void. The conversion privilege allowed, among other options, an exchange for another policy bearing the same date upon payment of a sum equal to the difference between the premiums actually paid and those which would have been earned by the substituted policy. The substituted policy, however, bore the date of its issue, and by its terms, the suicide provision ran from "one year from the date hereof." The plaintiff in the *Gans* case, *supra,* contended that since the insured might have exercised his option to have made the date of the original policy the date of the substituted policy, the option actually exercised should be construed to that effect. The New York court held that the insurance policy issued was a separate and independent contract to be construed without reference to the earlier original policy.

The *Dunken* case, *supra,* on the other hand, involved an original policy that by its terms, at the sole option of the insured, without medical examination, was convertible into a twenty payment life commercial policy bearing the same date and issued at the same age as the original policy upon payment of the difference between the premiums already paid and those required under the converted policy. Dunken exercised this option and applied to the company for a conversion "in

accordance with the conditions" of the original policy. His application stated that the statements and answers in the original application should be the basis for the new policy and form a part of the same. A new policy was issued on such basis and the original policy surrendered. These facts are totally dissimilar to the case at hand.

Furthermore, the facts here are even more dissimilar than *Gans, supra.* In the instant case, the language of the group contract clearly provided an option to the insured to convert his insurance into a separate and independent contract of insurance *bearing a new date of issue* which insurance would be on the form *then in use* by the insurance company and would include any clauses *then regularly included* in any individual life policy customarily issued by the company. Further, that the conversion privilege stated the amount of insurance could not be more than the amount covered by the group insurance; that the policy would not contain total disability or accidental death and dismemberment, double indemnity or other supplementary benefits; and would be issued without the insured being required to furnish evidence of insurability.

The actual facts of the matter show that evidence of insurability was furnished by medical examination contemporaneously with the application; that the face amount of the policy exceeded by $3,000 the insured amount under the group life policy; and that disability premium waiver and accidental double indemnity benefits were provided by the terms of the policy.

Under these set of facts, Respondent respectfully submits that the line of authority starting with *Gans, supra,* Also see, *Jarmon v. American Heritage Life Insurance Company* 267 A.2d 601 (Del. Sup. Ct. 1970) supports the finding of the District Court that there was no ambiguity in the policy in question, that the second policy formed a separate and independent contractual relationship with the company and that the one-year suicide clause ran from the date of issue of the second policy.

Petitioner's assertion that the Court of Appeals gave little consideration to the fact of whether or not a single, unbroken relationship existed between deceased and the insurance company does not follow from a reading of the Court's decision. The Court did conduct a close examination of the two policies and found that the two policies differed in the respects already alluded to in the Statement of Facts.

II.

THERE IS NO CONFLICT OF DECISION AMONG THE CIRCUITS

Respondent challenges Petitioner's contention that there is a conflict between the Fifth and Tenth Circuit Courts of Appeal. Petitioner cites *Moore v. John Hancock Mutual Life Insurance Company*, 436 F.2d 823 (5th Cir. 1971) as being in conflict with the instant decision of the Tenth Circuit Court of Appeals. Respondent would point to the distinction in the facts of the two cases. In *Moore, supra,* the conversion language in the group policy provided that the individual policy issued upon execution of the conversion privilege "shall be in any one of the forms then customarily issued by the company, except term insurance." The Court held that the word "form" was ambiguous and vague and referred to a generic type of insurance. However, the conversion privilege in this case is materially different in that it reads "the policy will be issued on the form then in use by the insurance company and will include any clauses then regularly included in any individual life policy then customarily used by the insurance company."

The Tenth Circuit Court of Appeals further discussed and distinguished the *Moore* case, *supra,* by pointing out that *Moore* was applying Florida law. In so doing, *Moore* did not turn on the question of whether the individual policy was separate and distinct from the earlier group policy, or a continuation of the group policy. Rather, the Fifth Circuit held

that the conversion clause entitled the insured to an individual policy the same as the group policy, i.e., without a suicide clause. Moreover, the Court noted that in *Moore* the beneficiary sought reformation of the individual policy. In the instant case, the beneficiary recognized the validity of the suicide clause in the individual policy and sought only a declaration that the period of incontestability be deemed to have commenced to run one year after the date the insured received his Certificate of Insurance under the group policy.

While Respondent contends that no conflict exists within the Circuits, were such a conflict to exist, this Court has said that when the questions involved are controlled by state law, a conflict between Circuits is not itself a reason for granting review by certiorari. See, *Ruhlin v. New York Life Insurance Company*, 304 U.S. 202, 58 S.Ct. 860 (1938). It is beyond argument that this case is controlled by state law.

III.

NO FEDERAL QUESTION IS PRESENTED NOR IS THIS A CASE RAISING ANY ISSUE OF SUFFICIENT GRAVITY OR IMPORTANCE TO CAUSE THE COURT TO GRANT CERTIORARI

It is undisputed that no federal question is involved, and despite Petitioner's fashionable attempt to raise a "consumer" issue by her arguments, no question of sufficient public importance or gravity is involved to meet the tests enunciated in *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 43 S.Ct. 422 (1923) and *Ex Parte Lau Ow Bew*, 144 U.S. 47, 12 S.Ct. 517 (1893).

Despite the rhetoric of Petitioner, there is absolutely not a scintilla of evidence in the record to suggest that the company induced the policy holder to bargain away his coverage. Courts of Colorado and elsewhere have consistently stated it is not

their function to rewrite contracts of insurance. The very disparate nature of the two policies indicates the deceased asked for and received coverage above and beyond that coverage guaranteed him under the group policy conversion clause. No special and important reason exists in this case to reach a problem "beyond the academic or episodic", see, *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S.Ct. 614 (1955), which is the real characterization of Petitioner's Complaint.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIORARI DENIED